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No. 93-11

In The

Supreme Court of the United States

October Term, 1993

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA, by and through its Tax Commissioner, Robert E. Hanson,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents attach great significance to their use of a procedural shortcut in this case. The Tax Commissioner did not issue an assessment of use tax against Quill but chose to proceed directly to court, requesting the entry of an order:

> [t]hat Quill is a "retailer" and a "retailer maintaining a place of business in this state." The State also requests executory relief to require Quill to obtain a North Dakota sales and use tax permit and collect and remit all tax, penalty and interest due from July 1, 1987.

Appendix ("App.") at 118.[1] Respondents allege that this procedure distinguishes the decision below from the other state supreme court decisions addressing the question of whether state courts are required to entertain § 1983 claims in state tax cases. Respondents' Brief at 4-8. Respondents also claim that because the Tax Commissioner went directly to court, Quill's Commerce Clause rights have not been violated. Respondents' Brief at 12-13. Finally, and incomprehensibly, Respondents complain that Quill attempted to avoid the requirement that it exhaust its administrative remedies by raising its § 1983 claim as a response to the Tax Commissioner's judicial enforcement action. Respondents' Brief at 13.

Respondents' claim that this case is distinguishable from *Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992), cert. denied, ___ S.Ct. ___, 66 U.S.L.W. 3850 (June 21, 1993), petition for rehearing filed August 9, 1993, is specious. As the petition for rehearing in *Bloomingdale's* correctly recognizes, the decision of the Supreme Court of North Dakota is "in direct conflict with the decision of the Tennessee Supreme Court". Petition for Rehearing at 1.[2]

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[1] The suit was filed July 7, 1989. App. at 118. Thus the Tax Commissioner was demanding the payment of two years taxes.

[2] Respondents reading of *Allison v. Board of County Commissioners of Johnson County, Kansas*, 737 P.2d 6 (Kan. 1987) is also in error. Respondents' Brief at 7. The court stated as follows regarding the obligation to hear § 1983 actions

> The principles of comity and the Tax Injunction Act, 28 U.S.C. § 1341 (1982), prevent actions in the federal courts based on a claim of unequal taxation of property by a state. If a § 1983 claim exists due to a state's

That Quill raised its § 1983 claim by way of a counterclaim to the Tax Commissioner's judicial enforcement action rather than as a plaintiff challenging a tax assessment has absolutely no relevance to the merits of Quill's § 1983 claim. Quill's § 1983 claim is based upon the Tax Commissioner's enforcement of an unconstitutional state law. This enforcement, regardless of the procedure chosen, gives rise to liability under 42 U.S.C. § 1983 and an award of fees under 42 U.S.C. § 1988.

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), involved a challenge to rules of the Virginia State Bar which prohibited legal advertising. The plaintiffs sued, among others, the Virginia Supreme Court, the Virginia State Bar and the Chief Justice of the Virginia Supreme Court in his individual and official capacities. The plaintiffs ultimately prevailed on their claim that the advertising restrictions were unconstitutional and then moved for attorney's fees.

The District Court awarded attorney's fees against the Virginia Supreme Court and the Chief Justice in his official capacity. However, the court concluded that special circumstances made it unjust to award attorney's fees against the Virginia State Bar, pointing out that the State Bar had actually attempted to assist in eliminating the advertising restrictions.

> unequal taxation or unequal assessment of property, the action must be brought in the state court. Fair Assessment in *Real Estate Assn. v. McNary*, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981).

737 P.2d at 11-12.

The issue before this Court in *Consumers Union* was whether attorney's fees could be recovered from the Virginia Supreme Court and the Chief Justice. The Court found that the Virginia Supreme Court and the Chief Justice were not liable for attorney's fees because of legislative immunity. The Court then said the following regarding the Virginia State Bar:

> We are not convinced that it would be unfair to award fees against the State Bar, which by statute is designated as an administrative agency to help enforce the State Bar Code. Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction.

446 U.S. at 739. The Tax Commissioner acted to enforce the unconstitutional "anti-*Bellas Hess*" statute enacted by the North Dakota legislature. Having done so, his office is liable for attorney's fees under 42 U.S.C. § 1983 and § 1988.

When it enacted 42 U.S.C. § 1988 in 1976, Congress anticipated the award of attorney's fees to a party which challenges the constitutionality of a state law as a defendant rather than as a plaintiff. The Senate Report stated:

> In the large majority of the cases the party or parties seeking to enforce such rights [protected by the statutes enumerated in section 1988] will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors. See, e.g. *Shelley v. Kramer,* 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1948).

S. Rep. No. 94-1011, 94th Cong., 2d Sess., at 4. [Bracketed material added] The citation to *Shelley v. Kraemer* is significant. In that case the plaintiff sued to enforce a racially restrictive real estate covenant. The Shelleys, as defendants, successfully objected to enforcement on constitutional grounds. Congress' citation of *Shelley*, makes it clear that a party which successfully defeats an enforcement action on constitutional grounds is entitled to an award of attorney's fees in the same manner as a prevailing plaintiff. See *Kirchberg v. Feenstra*, 708 F.2d 991, at 996 (5th Cir. 1983) and cases cited therein. Quill successfully defeated the Tax Commissioner's enforcement action on constitutional grounds and is entitled to attorney's fees under 42 U.S.C. § 1988.

Petitioner respectfully requests this Court to grant a Writ of Certiorari and reverse the decision of the North Dakota Supreme Court.

Respectfully submitted,

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